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IN THE

Supreme Court of the United States

October Term, 1961

No. 722

In the Matter of the Petition of Moore-McCormack Lines, Inc., as Owner of the S.S. "MORMACKITE" for Exoneration from or Limitation of Liability.

MOORE-McCORMACK LINES, INC.,

Petitioner,

—against—

JEAN O. RICHARDSON, Individually and as Executrix of the Estate of Harold H. Richardson *et al.*,

Respondents.

CROSS-PETITION OF MOORE-McCORMACK LINES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Moore-McCormack Lines, Inc., prays that a writ of certiorari issue to review two decisions on damages issues contained in the judgment of the United States Court of Appeals for the Second Circuit entered October 25, 1961, if claimants' petition for certiorari in No. 667, is granted.

Citations to Opinions Below

The Court of Appeals decision is reported at 295 F. 2d 583. A copy is included in the Appendix in No. 667 at pp. 21-47.

The prior District Court opinion is reported at 184 F. Supp. 585.

The District Court opinion after trial on the merits is reported at 164 F. Supp. 198. The Court of Appeals opinion, reversing in part and affirming in part, is reported at 272 F. 2d 873. This Court denied certiorari. 362 U. S. 990.

Jurisdiction

The judgment of the Court of Appeals was entered on October 25, 1961. The time to apply for certiorari was extended to and including March 1, 1962 by order of Mr. Justice Harlan dated January 4, 1962.

Jurisdiction lies here under 28 U. S. Code §1254.

Questions Presented

Four death and seven injury claimants in this limitation of liability proceeding have filed a petition, No. 667, for a writ of certiorari seeking to review the decision below on four damages issues. If their petition is granted petitioner seeks review of the following questions:

1. Is it proper to make generous money awards for loss of "nurture" to minor children of deceased seamen, in addition to handsome awards for loss of support during minority, where there has been no finding or substantial evidence that "nurture" in the sense of intellectual, moral and physical training (see *Michigan Central R.R.* v. *Vreeland*, 227 U. S. 59) was actually lost.

2. Is it proper to allow pre-judgment interest on awards for pecuniary loss resulting from wrongful death of seamen?

Statutes Involved

The statutes involved are the Federal Employers' Liability Act, 45 U. S. Code §51-60, made applicable to seamen by the Jones Act, 46 U. S. Code §688; the Death on the High Seas Act, 46 U. S. C. §761 *et seq.*, and 28 U. S. Code §1961. These are the applicable sections:

Federal Employers' Liability Act

§51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the State or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. • • •

Jones Act

§688. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the

right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. • • •

Death on the High Seas Act

§761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. March 30, 1920, c. 111, §1, 41 Stat. 537.

§762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have

suffered by reason of the death of the person by whose representative the suit is brought. Mar. 30, 1920, c. 111, §2, 41 Stat. 537.

28 U. S. Code §1961. Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. • • • Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

Statement

On October 7, 1954, petitioner's steamship MORMACKITE capsized off Cape Hatteras, in stormy weather, and sank with total loss of ship and cargo and the loss of thirty-seven of her forty-eight man crew. Petitioner then began this limitation of liability proceeding. Prior to trial and pending appeals most of the claims were settled. After trial on the merits the District Court found petitioner liable without limitation. 164 F. Supp. 198. The Court of Appeals affirmed except that it held petitioner entitled to limit its liability as to cargo claims. 272 F. 2d 873. This Court denied certiorari. 362 U. S. 930. The District Court then tried damage issues and made awards. 184 F. Supp. 585. Petitioner appealed from certain aspects of four death and seven personal injury awards and the four death claimants appealed on two points. The Court of Appeals reversed in part and affirmed in part.

Reasons for Granting the Writ

(a) As to the first question presented.

The decision below conflicts with principles firmly established by this Court.

In *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, this Court held that a "pecuniary loss" must be one "which can be measured by some standard."; that it does not include "loss of society and companionship"; that when the beneficiary is a child it may include:

> "• • • the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation" (p. 71).

This Court defined "nurture" as the

> "• • • intellectual, moral and physical training, such as when obtained from others must be for financial compensation. In such a case it has been held that 'the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages" (p. 73).

In *American Railroad Company of Porto Rico* v. *Didricksen*, 227 U.S. 145, this Court held that loss of society or companionship "is not a pecuniary loss under such a statute" as the F.E.L.A. (p. 150).

In *Norfolk and Western Ry.* v. *Holbrook*, 235 U.S. 625, this Court held that

> "• • • the total damage resulting to a minor child from a parent's death • • • must be based upon money

values, the amount of which can be ascertained only upon a view of the peculiar facts presented" (p. 629).

Despite these clear precepts, the District Court made large awards for nurture, and the Court of Appeals affirmed, with no finding of the loss of the things this Court has so clearly held must be proved.

As to Richardson:

The District Court awarded $150,171 to Richardson's widow and two children for loss of pecuniary benefits from his earnings and an additional $26,840 to his two children for loss of "nurture." To support this large additional award, the Court made only these findings: That Richardson was "a devoted husband and father * * * acquired his own house in 1951 and thereafter improved it * * * maintained a car for his family * * * regularly brought them gifts from foreign countries" and "while at home between voyages and during his annual vacations he spent most of his time with his wife and children * * * he was a devoted husband and father." 184 F. Supp. p. 591, col. 1.

But devotion, maintaining a car, gifts from foreign countries and time spent with wife and children are not "instruction, training, advice and guidance", which this Court has plainly held must be established as a prerequisite to awards for loss of nurture. Furthermore, there is neither evidence nor finding that any of the things which the Court mentioned in connection with nurture could or would be (in the words of *Vreeland*) "supplied by the service of another for compensation"—nor was there evidence as to the cost of such service of another, compelling the Court to rely upon guess in evaluating the loss, if there was any.

As to Wall:

The District Court awarded $151,819 to Wall's widow and three children for loss of pecuniary benefits from his earnings and an additional $30,240 to his three children for loss of "nurture." To support this large additional award, the Court said this: "* * * Wall was a devoted husband and father" and each of his children "has lost, for the period of minority, the deceased's nurture, care and training, the value of which I find to be $1,000 per year per child." 184 F. Supp., p. 596, col. 1. There is no finding that Wall ever once instructed, trained, advised or guided any of his children. The Court's figure of $1,000 per year per child was pulled out of a magician's hat and may as well have been any other figure, there being no evidence on which to base it.

As to Cadiz:

The District Court awarded $51,750 to Cadiz's widow and two children for loss of pecuniary benefits from his earnings and an additional $15,930 to his two children for loss of nurture. As to this loss the Court made only these findings:

> "The deceased, while certainly not a good example of industry, was nevertheless kind and devoted to his children. * * * he spent considerable time with them; frequently played ball with them; encouraged them to study and took them to the museums. The children have lost this care and nurture which I find to be worth $750 per year to each child." 184 F. Supp. p. 606, col. 1.

In *Vreeland* and *Holbrook* this Court made it clear that the "fitness" of the parent to instruct, etc., is an important consideration; yet here was a man whom the Court found was "not a good example of industry." Spending time with

his children and playing ball with them may prove love and affection but certainly do not constitute "instruction, training, advice and guidance." The nearest thing to a finding which could support an award for loss of nurture is that Cadiz encouraged his children to study and took them to the museums. This is the thinnest possible ground. Not even such a finding was made in either the Richardson or the Wall cases, and in Cadiz's case, as in the others, there is no finding as to how the Court got from generalities to the hard figure of $750 per child per year.

The Court of Appeals, in the Richardson case, although saying that there was evidence to support awards for loss of a father's care, guidance and training, did not refer to any. It did no more than repeat the sterile findings of the District Court (Ap. 26). That the Court may have been confused is suggested by its saying in the same paragraph both that the nurture awards were "generous" and of "comparative modesty" (Ap. 26). As to the Wall case, the Court of Appeals said only, "We affirm the awards for loss of nurture." As to Cadiz, the Court of Appeals said only: "There is sufficient evidence in the record of the deceased's good character and the interest which he took in his children to justify the award for loss of nurture. Since the awards are not clearly excessive they must be affirmed" (Ap. 29). "Good character" and "interest," indeed!

Petitioner submits that these awards present an important question of general interest. It is apparent that the awards were, in reality, for loss of the love, affection and companionship of a father rather than for pecuniary loss of actual training and guidance, whether mental, moral or physical. This is particularly true since the Court made no finding (claimants adduced no evidence on which to make one) as to the possible cost of (in the words of *Vreeland*), "the service of another for compensation."

Awards in death and injury cases have skyrocketed and shipping companies generally are groaning under the load. Yet in this case the court below, by failing to require substantial proof, and failing to make basic findings, has opened wide the door to the imposition of new, heavy and legally unwarranted burdens on an already financially sick industry by requiring payment of money damages for loss of love and affection for which there is no right to compensation. Basic human rights of petitioner's stockholders, who committed no tort themselves,* are improperly invaded by allowing damages for loss of a father's love and affection under the false label of "nurture." This is an issue which deserves the attention of this Court.

(b) As to the second question presented.

The District Court denied pre-judgment interest on the death damage awards, citing *Casey* v. *American Export Lines*, 2 Cir., 173 F. 2d 324, 326, a Jones Act case, and refused to follow *Stiles* v. *National Airlines, Inc.*, 5 Cir., 268 F. 2d 400, cert. denied, 361 U.S. 885, a Death on the High Seas Act case. 184 F. Supp. p. 595, footnote 17.

The Court of Appeals refused to follow its own *Casey*, cited *Stiles* and, exercising the discretion of an admiralty court, allowed limited pre-judgment interest.

The decedents were all seamen. The Jones Act, *supra* pp. 3-4, was enacted especially for the benefit of seamen and their dependents and should control, to the exclusion of the Death on the High Seas Act, *supra* pp. 4-5, which was enacted later during the same session of Congress for the benefit of the general public, which had theretofore had no remedy at all, under our law, for loss of life.

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* The ship was structurally seaworthy; the loss was caused by bad stowage, abroad, by the ship's officers, for whose acts petitioner was held only because of *respondeat superior*.

The Jones Act put seamen under the same blanket with railroad employees, the F.E.L.A. It is well-established that under the F.E.L.A. pre-judgment interest is not allowed in death cases. *Cortes* v. *Baltimore Insular Line, Inc.*, 2 Cir., 66 F. 2d 526, reversed on other grounds, 287 U.S. 367; *Cleveland Tankers* v. *Tierney*, 6 Cir., 169 F. 2d 622, 626; *Powers* v. *New York Central R. Co.*, 2 Cir., 251 F. 2d 813; *Briggs* v. *Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481; *Lynott* v. *Great Lakes Transit Corp.*, 202 App. Div. 613, affirmed 234 N.Y. 626, *Murmann* v. *New York, New Haven, etc. R. Co.*, 258 N.Y. 447.

Since Congress equated seamen with railroad workers, it was plain error for the Court of Appeals to allow any pre-judgment interest.

The Court of Appeals thought that interest could be allowed because it was not expressly excluded by the statutory language. But the rule is just the opposite—viz.: Only those things that the statute expresses are allowed. In *Michigan Central R. Co.* v. *Vreeland*, *supra*, p. 6, 227 U.S. 59, the Court held that there could be no recovery by the personal representative for conscious pain and suffering between injury and death, i.e., the right did not survive, because the statute did not expressly say it did. *St. Louis and Iron Mt. Ry.* v. *Craft*, 237 U.S. 648 holds the same.

In *Lindgren* v. *United States*, 281 U.S. 38, this Court held that there could be no recovery by non-dependent relatives because the statute did not say there could be, although the law of the state permitted it.

In *Louisiana and Arkansas Ry. Co.* v. *Pratt*, 5 Cir., 142 F. 2d 847, the Court said:

> "We think, therefore, that the silence of the federal statute upon the subject of interest may not be con-

strued as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict" (pp. 848-9).

Absent any provision in the Act allowing interest, Title 28 U.S. Code (1961, *supra* p. 5, should apply. It provides that in civil cases interest shall be calculated from the date of judgment. *Briggs v. Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21, affirmed on other grounds, 334 U.S. 304; *Murphy v. Lehigh Valley R. Co.*, E.D.N.Y., 63 F. Supp. 928.

If a writ is granted in No. 667, petitioner here will argue that this Court should reverse the decision of the Court of Appeals and reinstate the District Court's disallowance of pre-judgment interest.

Special Prayer

Petitioner prays the Court to consider this petition with No. 667.

Petitioner also prays the Court to indicate, should either petition be granted, which points it will consider and which it will not so that petitioner may make full and final payment as promptly as possible to any claimants whose claims will not be before this Court.

Respectfully submitted,

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Dated: New York, New York
February 6, 1962